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EMPLOYMENT

George Mason University School of Law

George Mason University Foundation Professor, August 2010—present

Professor, August 2002-August 2010

Associate Professor, September 1998-August 2002

Assistant Professor, August 1995-August 1998

William and Mary Law School

Visiting Professor, Spring 2014 (short course)

Brooklyn Law School

Visiting Professor, Fall 2006

University of Michigan Law School

Visiting Professor, Fall 2005-Spring 2006

Georgetown University Law Center

Visiting Professor, Spring 2003

John M. Olin Foundation

Junior Faculty Fellow, 1997-98 (paid research leave awarded to five humanities scholars nationwide)

Columbia Law School

Mellon Foundation Fellow, Julius Silver Program in Law, Science, and Technology, 1994-95

Crowell & Moring

Associate, 1992-94

Honorable David A. Nelson

Sixth Circuit U.S. Court of Appeals
Law Clerk, 1991-92

PROFESSIONAL SERVICE

Academic Referee: *Harvard Law Review*, *Journal of American History*, *Jurimetrics*, *Law and History Review*, *Law and Social Inquiry*, *Law and Society Review*, *Cambridge University Press*, *Oxford University Press*, *Supreme Court Economic Review*, *Yale Law Journal*, *Independent Review*, *Yale University Press*

AALS Section on Evidence

Chair, 2005; Chair-elect, 2004; Secretary 2003

Cato Supreme Court Review

Board of Editors, 2003-present

George Mason University School of Law

Annual committee service, including seven-time chair of the appointments committee

EDUCATION

Yale Law School

J.D. 1991

Senior Editor, *Yale Law Journal*

John M. Olin Fellow in Law, Economics, and Public Policy

Lambe Fellow, Institute for Humane Studies

Brandeis University

B.A. *Summa cum laude* (History) 1988

Phi Beta Kappa

PUBLICATIONS

Books

Lawless: The Obama Administration's Unprecedented Assault on the Constitution and the Rule of Law
(forthcoming Encounter Books Fall 2015)

A Conspiracy against Obamacare: The Volokh Conspiracy and the Health Care Case (Palgrave MacMillan 2013) (co-author with Adler, Barnett, Kerr, Kopel, and Somin)

Rehabilitating Lochner: Defending Individual Rights against Progressive Reform (University of Chicago Press 2011; paperback 2012)

The New Wigmore: Expert Evidence (Aspen Law and Business 2004 and annual supplements; 2d edition 2011) (co-author with Kaye and Mnookin)

You Can't Say That!: The Growing Threat to Civil Liberties from Antidiscrimination Laws (Cato Institute 2003; paperback 2004)

Only One Place of Redress: African-Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal (Duke University Press 2001)

Phantom Risk: Scientific Inference and the Law (MIT Press 1993; paperback 1999) (co-editor with Foster and Huber)

Articles and Book Chapters

Defending *Daubert*: It's Time to Amend Federal Rule of Evidence 702, 57 *Wm. & Mary L. Rev.* __ (2015) (co-author with Eric Lasker)

What to do about Federal Agency Science: Some Doubts about Regulatory *Daubert*, 22 *George Mason L. Rev.* __ (2015) (symposium)

The Misbegotten Judicial Resistance to the *Daubert* Revolution, 89 *Notre Dame L. Rev.* 27 (2014)

The Mainstreaming of Libertarian Constitutional Thought, 76 *L. & Contemp. Probs.* 43 (2014) (co-author with Ilya Somin) (symposium)

"Reverse *Carolene Products*," the End of the Second Reconstruction, and other Thoughts on *Schuette v. Coalition to Defend Affirmative Action*, 2014 *Cato Sup. Ct. Rev.* 261 (invited)

From Progressivism to Modern Liberalism in Constitutional Law: Louis D. Brandeis as a Transitional Figure, 89 *Notre Dame L. Rev.* 2029 (2014) (symposium)

Schuette v. Coalition to Defend Affirmative Action and the Failed Attempt to Square a Circle, 89 *NYU J. Law & Liberty* 210 (2013) (invited)

The Progressive Origins of Conservative Hostility to *Lochner v. New York*, in Jonathan O'Neill & Joseph Postell, eds., *Toward an American Conservatism: Constitutional Conservatism during the Progressive Era* (Palgrave MacMillan 2013)

Oyez, Oyez, Oyez! Curious Cases at the Supreme Court, *Phi Kappa Phi Forum*, Fall 2013, at 18 (invited)

The Conservative Origins of Strict Scrutiny, 19 *Geo. Mason L. Rev.* 861 (2012) (symposium)

Brandeis Brief Myths, 15 *Green Bag* 2d 9 (2011)

Lochner and Constitutional Continuity, 36 *J. Sup. Ct. Hist.* 116 (2011) (peer-reviewed)

Excluding Unfit workers: Social Control Versus Social Justice in the Age of Economic Reform, 72 *L. & Contemp. Probs.* 177 (2009) (co-author with Thomas C. Leonard) (symposium)

Revisiting *Yick Wo v. Hopkins*, 2008 *Ill. L. Rev.* 1393 (symposium)

Getting to Causation in Toxic Tort Cases, 74 *Brooklyn L. Rev.* 51 (2008)

Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the *Daubert* Revolution, 93 *Iowa L. Rev.* 451 (2008)

Learning the Wrong Lessons from “An American Tragedy,” 104 *Mich. L. Rev.* 1961 (2006)

The Red Menace Revisited, 100 *Nw. U. L. Rev.* 1295 (2006) (review essay of Martin Redish, *The Logic of Persecution: Free Expression and The McCarthy Era*)

Lochner v. New York: A Centennial Retrospective, 83 *Wash. U.L.Q.* 1469 (2005)

Thoughts on *Hodges v. United States*: Comment on Karlan, 82 *B.U. L. Rev.* 811 (2005) (symposium)

Bolling, Equal Protection, Due Process, and *Lochner*phobia, 83 *Geo. L.J.* 1253 (2005) (symposium)

Judicial Power and Civil Rights Reconsidered, 114 *Yale L.J.* 593 (2004) (review essay of Michael Klarman, *From Jim Crow to Civil Rights*) (co-author with Ilya Somin)

Lochner v. New York: Barrier to the Growth of the Regulatory State, in Michael Dorf, ed., *Constitutional Law Stories* (Foundation Press 2004)

The Right to Petition, in *The Heritage Guide to the Constitution* (David Forte, ed. 2004 and 2d. ed. 2012)

Expressive Association after *Dale*, 21 *Social Phil. & Pol’y* 195 (2004), also published in Ellen Frankel Paul, ed., *Freedom of Speech* (Cambridge Univ. Press 2004)

The *Daubert* Trilogy in the States, 44 *Jurimetrics J.* 351 (Spring 2004) (co-author with Jeffrey Jackson)

Keeping Junk Science Out of the Asbestos Litigation, 31 *Pepp. L. Rev.* 11 (2003) (symposium)

Defending the First Amendment from Antidiscrimination Laws, 92 *N.C. L. Rev.* 223 (2003)

Lochner's Feminist Legacy, 101 *Mich. L. Rev.* 2176 (2003) (review essay of Julie Novkov, *Constituting Workers, Protecting Women*)

Lochner's Legacy's Legacy, 82 *Tex. L. Rev.* 1 (2003)

Lochner Era Revisionism, Revised: *Lochner* and the Rise of Fundamental Rights Constitutionalism, 92 *Geo. L.J.* 1 (2003)

Improving the Qualifications of Experts in Medical Malpractice Cases, 1 *Law, Probability & Risk* (2002)

Frye, Frye, Again: The Past, Present, and Future of the General Acceptance Test, 41 *Jurimetrics J.* 385 (2001)

Antidiscrimination Laws and the First Amendment, 66 *Mo. L. Rev.* 83 (2001) (symposium)

The Right of Expressive Association and Private Universities' Racial Preferences and Speech Codes, 9 *Wm. & Mary Bill Rts. L.J.* 619 (2001) (invited)

Railroad Unions, Racism, and Labor Regulations, 5 *Independent Rev.* 237 (2000) (peer-reviewed)

Lochner vs. *Plessy*: The *Berea College* Case, 25 *J. Sup. Ct. Hist.* 93 (2000) (peer-reviewed)

Assessing the Social and Legal Consequences of Scientific Ambiguity, in *Cutting Green Tape: Tort Law, Bureaucracy and the Environment* (Meiners & Stroup eds., Independent Institute 2000) (co-author with Foster and Huber)

The Breast Implant Fiasco, 87 *Cal. L. Rev.* 457 (1999)

Lochner, Parity, and the Chinese Laundry Cases, 41 *Wm. & Mary L. Rev.* 211 (1999)

Two Asian Laundry Cases, 23 *J. Sup. Ct. Hist.* 95 (1999) (peer reviewed)

Sex Discrimination Laws Versus Civil Liberties, 1999 *U. Chi. Leg. Forum* 133 (1999) (symposium)

The Abuse of Opening Statements and Closing Arguments in Civil Litigation, *Court Rev.: Journal of the American Judges' Association*, Fall/Winter 1997, at 16; revised version published as Manhattan Institute Civil Justice Memo No. 38 (Aug. 1999)

'Non-Scientific' Expert Witnesses: What Degree of Judicial Scrutiny Should They Face?, Washington Legal Foundation, Oct. 1998

Philip Sober Restraining Philip Drunk: *Buchanan v. Warley* in Historical Perspective, 51 *Vand. L. Rev.* 799 (1998)

The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans, 74 *Tex. L. Rev.* 781 (1998)

The Shameful, Wasteful History of New York's Prevailing Wage Law, 7 *George Mason Civ. Rts. L.J.* 1 (1997)

Lessons from the American Experience, in *Law and Markets* (Robson & Lippert eds. 1997)

Loser-Pays: Where Next? 55 *Md. L. Rev.* 1161 (1996) (co-author with Walter Olson)

Junk Science in the United States and the Commonwealth, 21 *Yale J. Int'l L.* 123 (1996)

Leading Expert Evidence: A U.S. Perspective, 3 *James Cook U. L. Rev.* 170 (1996)

Procedural Tort Reform: Lessons from Other Nations, *Regulation*, No. 1, 1996, at 67

The Science of Forensic Psychiatry and Psychology, 2 *Psychology, Psychiatry & L.* 75 (1995)

The Davis-Bacon Act: Vestige of Jim Crow, 13 *Nat'l Black L.J.* 276 (1994)

Licensing Laws: A Historical Example of the Use of Government Regulatory Power against African-Americans, 30 *San Diego L. Rev.* 89 (1994) (symposium)

The Admissibility of Scientific Evidence after *Daubert v. Merrell Dow Pharmaceuticals*, 15 *Cardozo L. Rev.* 2139 (1994) (symposium)

Scientific Evidence after *Daubert v. Merrell Dow Pharmaceuticals*, *Health & Environment Digest*, April 1994, at 3

Science and the Toxic Tort: New Guidelines for the Admissibility of Scientific Evidence, 261 *Science* 1509 (1993) (co-author with Foster and Humber)

Scientific Evidence in the Courtroom: Admissibility and Statistical Significance after *Daubert*, Washington Legal Foundation (1993) (co-author with Robert Charrow)

Daubert Plaintiffs Won Battle, Lost War, *Product Safety and Liability Rep.* (BNA) *Special Report: Daubert: What Next?*, Summer/Fall 1993, at 16 (co-author with Peter Huber) (article also appeared in *Shepard's Scientific and Expert Evidence Quarterly*)

Co-author of several chapters of *Phantom Risk: Scientific Inference and the Law* (MIT Press 1993)

Roots of the 'Underclass': The Decline of Laissez-faire Jurisprudence and the Rise of Racist Labor Legislation, 43 *Am. U. L. Rev.* 85 (1993)

Equal Protection for Economic Liberty: Is the Court Ready?, Cato Institute (October 1992)

From Pesthouses to AIDS Clinics: Neighbors' Irrational Fears of Treatment Centers for Contagious Diseases, 23 *Colum. Hum. Rts. L. Rev.* 1 (1990)

Out of the *Fryeing* Pan and into the Fire: The Expert Witness Problem in Toxic Tort Litigation, 10 *Rev. Litig.* 117 (1990)

Note, The Supreme Court and 'Civil Rights,' 1886-1908, 100 *Yale L.J.* 725 (1990)

Note, A Contractual Solution to the Contraceptive Crisis, 8 *Yale L. & Pol'y Rev.* 146 (1989)

Shorter Publications

Review of Phillip Hamburger, *Is Administrative Law Unlawful?*, *L. & Hist. Rev.* (forthcoming)

Reassessing *Lochner v. New York*, in Paul J. Larkin, ed., *Economic Liberty and the Constitution: An Introduction*, Heritage Foundation Special Report No. 157, Oct. 1, 2014.

Hispanics and Affirmative Action in State Universities after *Fisher*, *Scotusblog*, June 25, 2013, <http://www.scotusblog.com/2013/06/commentary-hispanics-and-affirmative-action-in-state-universities-after-fisher/> (op-ed)

Review of Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Times*, *Reason.com*, May 21, 2013

Affirmative Action after *Fisher*: Back to the Future?, *Scotusblog*, Sept. 6, 2012, <http://www.scotusblog.com/2012/09/online-fisher-symposium-affirmative-action-after-fisher-back-to-the-future/> (op-ed)

Is this 1936?, *Scotusblog*, June 29, 2012, <http://www.scotusblog.com/2012/06/is-this-1936/> (op-ed)

The Role of *Lochner* in the Health Care Litigation, *Jurist*, March 2012, <http://jurist.org/forum/2012/03/david-bernstein-lochner.php> (op-ed)

Lochner v. New York, the Judiciary, and Legitimate Constitutionalism, *Claremont Review of Books* (Dec. 2011)

Response to George W. Liebmann, 21 *L. & Pol. Book Rev.* 441 (2011)

Oliver Wendell Breyer, *Newark Star-Ledger*, July 12, 2011 (co-authored with Josh Blackman) (op-ed)

Context Matters: A Better Libertarian Approach to Antidiscrimination Laws, *Cato Unbound*, June 16, 2010

The Neglected Case of *Buchanan v. Warley*, *Scotusblog*, Feb. 10, 2010

The Unfinished *Daubert* Revolution, *Engage: Journal of the Federalist Society Practice Groups*, Feb. 2009, at 35.

Rufus Peckham, in *The Yale Biographical Dictionary of American Law* (Roger K. Newman ed. 2009)

Roberts v. Jaycees, in *Encyclopedia of the First Amendment* (John R. Vile et al. eds. 2008)

Right to Petition, in *Encyclopedia of the First Amendment* (John R. Vile et al. eds. 2008)

Liberty of Contract, in *Encyclopedia of the Supreme Court of the United States* (David S. Tanenhaus ed. 2008)

Munn v. Illinois, in *Encyclopedia of the Supreme Court of the United States* (David S. Tanenhaus ed. 2008)

Allgeyer v. Louisiana, in *Encyclopedia of the Supreme Court of the United States* (David S. Tanenhaus ed. 2008)

Buchanan v. Warley, in *The New Encyclopedia of Southern Culture* (Charles Reagan Wilson ed. 2008)

Emigrant Agent Laws, in *The New Encyclopedia of Southern Culture* (Charles Reagan Wilson ed. 2008)

Review of Paul Moreno, *Blacks and Organized Labor: A New History*, *Independent Review* (Dec. 2006)

Liberty of Contract, in the *Encyclopedia of American Civil Liberties* (Paul Finkelman ed. 2006)

The Right to Petition, in the *Encyclopedia of American Civil Liberties* (Paul Finkelman ed. 2006)

Quackspertise, *Wall Street J.*, Sept. 30, 2006 (op-ed)

Affirmative Blackmail, *Wall St. J.*, Feb. 11, 2006 (op-ed)

The Right to Petition, in *The Heritage Guide to the Constitution* (2005)

Review of Ken Kersch, *Constructing Civil Liberties*, *American Historical Rev.*, Oct. 2005

Peg-Leg Williams, in *One Hundred Americans Making Constitutional History* (Melvin Urofsky, ed. 2004)

Review of Barbara Welke, *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865-1920*, *American J. Legal History* (2003)

Review of Michael J. Phillips, *The Lochner Court Myth and Reality: Substantive Due Process from the 1890s to the 1930s*, *Law & History Rev.* (Winter 2003)

Let Private Colleges Practice Affirmative Action, *Cato Daily J.* (and syndicated newspapers), June 23, 2003 (op-ed)

Codes Out: Department of Education Cuts Red Tape On Speech Restrictions, *Nat'l Rev. Online*, Aug. 21, 2003 (op-ed)

Free Speech? Not on Campus, *Orange County Register*, Oct. 21, 2003 (op-ed)

Solomon Amendment Fight, *Harv. Law Rec.*, Nov. 20, 2003 (op-ed)

Canadian Thought Police on the March, *Nat'l Rev. Online*, Dec. 2, 2003 (op-ed)

Review of Richard C. Cortner, *Civil Rights and Public Accommodations: The Heart of Atlanta Motel and McClung Cases*, *Ideas on Liberty*, Nov. 2002, at 58

Junk Science in the Asbestos Litigation, *Mealey's Asbestos Reporter* (Aug. 2002)

Junk Expert Testimony: The Battle Rages On, *Engage: The Journal of the Federalist Society's Practice Groups*, 2002, at 112

Tort Reform Lessons, *Aetna 2001 Annual Report* (2002)

Disinterested in *Daubert*: State Courts Lag Behind in Opposing "Junk" Science, Washington Legal Foundation, Legal Opinion Letter (June 21, 2002)

Casey Martin Ruling is Par for the Course, *Wall St. J.*, May 30, 2001 (op-ed)

The ACLU Has Lost its Way, *Cincinnati Enquirer*, May 16, 2000, at 8 (also published in other newspapers) (op-ed)

Anti-Bias Laws vs. Civil Liberties, *Wash. Times*, Aug. 15, 1999 (op-ed)

Review of Julie Novkov, *Constituting Workers, Protecting Women: Gender, Law and Labor in the Progressive Era and New Deal Years* (Eh.net—economic historians' listserv)

Comment on *Kumho Tire*, *AALS Section on Evidence Newsletter*, Spring 1999, at 3

Letter to the Editor, Judge was Correct to Exclude Testimony, *Legal Times*, April 12, 1999, at 23

Comment on Gary Edmond and David Mercer, *The Politics of Jury Competence*, in *Technology and Public Participation* (Xlibris 1999)

A Breast Bone of Contention, *Los Angeles Daily J.*, Aug. 26, 1998, also published in *Litigation News*, Winter 1998, at 7 (op-ed)

Review of *Science on Trial*, *Litigation News*, Spring 1997, at 4

Good Science Wins a Victory in the Courtroom, *Charlotte Observer*, Jan. 24, 1997, at 13A (also published in several other newspapers) (op-ed)

Legal Reform: Learning from the Commonwealth, *Manhattan Institute Civil Justice Memo* No. 25 (May 1996)

Breast Implants: A Study in Phantom Risks, *Manhattan Institute Research Memorandum* No. 5 (April 1995)

It's Time to Reform New York's Prevailing Wage Law, Empire Foundation for Public Policy Research (September 1993) (think tank study)

Hauling Junk Science Out of the Courtroom, *Wall St. J.*, July 14, 1993, at A16 (op-ed)

Junk Science in the Courtroom, *Wall St. J.*, March 24, 1993, at A15 (op-ed)

The Davis Bacon-Act: Let's Put an End to Jim Crow, Cato Institute (January 1993)

Why Johnny Can't Pray, *Reason*, Feb. 1992, at 56

Exclusionary Rule: Something's Not Kosher About Davis-Bacon, *Reason*, Aug./Sept. 1991, at 32

Blocking the Lights, *Reason*, Nov. 1990, at 40

Regulating What Children Watch, *Liberty*, Jan. 1990, at 63